No. 22742

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DISTRICT COUNSEL OF PAINTERS NO. 16 OF ALAMEDA, MARIN, CONTRA COSTA, NAPA, SOLANO, YOLO, PLACER, SACRAMENTO, NEVADA, EL DORADO AND SIERRA COUNTIES,
Appellants,

VS.

PAINTERS UNION LOCAL 127, PAINTERS UNION LOCAL 560, PAINTERS UNION LOCAL 1178, SAM CAPONIO, WALLACE ROOD, DALE BALL, JAMES L. BROWN, TED CARTY, LEE LOPEZ AND MORRIS KOMIE,
Appellees.

APPELLANTS' OPENING BRIEF

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JURISDICTION

These actions, which were consolidated for purposes of trial and this appeal, were brought by three (3) local unions and seven (7) individuals who were members of said local unions against Appellants who are the District Counsel of Painters No. 16, which is composed of the Appellee local unions and other local unions, and the officers of the District Counsel.

The complaints sought to enjoin the Appellants from taking any action to collect increased dues imposed by the Appellant, District Counsel in 1966. Thereafter, the lower Court held that the Appellants' action regarding the dues increase in 1966 did not comply with 28 USC 411(a) (3) and for that reason was unlawful. The lower Court entered its judgment and decree enjoining the Appellants from taking any action to collect or discipline any plaintiff for failure to pay the increased dues imposed in the 1966 action of the Appellants on February 2, 1968.

The jurisdiction of this Court to review the judgment rests on 28 USC 1291. The jurisdiction of the District Court rests on 29 USC 411 and 412.

STATEMENT OF THE CASE

The Appellees are three (3) local house painter unions of some eight (8) local house painter unions who together with five (5) autonomous painter unions are affiliated with the Appellant (R-32). The appellant is affiliated with and operates under the charter from the Brotherhood of Painters, Decorators and Paper Hangers of America AFL-CIO and has a territorial jurisdiction which covers the counties of Alameda, Marin, Contra Costa, Napa, Solano, Yolo, Placer, Sacramento, Nevada, El Dorado and Sierra in the State of California (R-31).

Article VI section 6(d) of the Appellants By-Laws, enacted in 1956, provided as follows:

"(d) The regular monthly dues for journeymen house painters, beneficial members, shall be increased in addition to the amount now being paid by the sum of money equal to the raise negotiated for one day (7 hours) and such additional payment of dues shall commence with the next effective annual date of the contract and continue for each succeeding twelve month period. Such increase would be leveled off at the nearest 25¢ divisible period. As a result of any dues increase to become effective, 50% shall go to the LU and 50% shall go to the DC as increased special per capita tax." (R-33)

Since 1962, Article VI, section 6(d) of said By-Laws have provided as follows:

"(d) The regular monthly dues for journeymen house painters, beneficial members, shall be increased in addition to the amount now being paid by the sum of money equal to the raise negotiated for one day (7 hours) and such additional payment of dues shall commence with the next effective annual date of the contract and continue for each succeeding twelve month period. Such increase would be leveled off at the nearest 25¢ divisible period. As a result of any dues increase the delegates to the District Council shall determine by vote what proportion will remain in the Local Union and what proportion will go to the District Council. In the event the delegates of the District Council deem it feasible to the best interests of the

> District Council, the Local Unions and the Membership, the delegates may at any regular meeting declare a waiver on all or part of a dues raise by a majority vote." (R-33)

Although the hourly wage of journeyman painters (pursuant to the terms of Collective Bargaining Agreements periodically negotiated with employers in the territory covered by Appellant) increased each year since 1957 the actual dues imposed upon members were increased but four different times including the raise in 1966 which is the subject of the within action. (R-44)

Effective as of July 1, 1965, pursuant to the terms of the Collective Bargaining Agreement negotiated at or about that time with employers in the Northern California Area, a wage increase equivalent to fifty cents per hour was negotiated. (R-34)

Applying the formula as set forth in the By-Laws section described above, the Appellant had the authority to increase journeyman dues by three dollars fifty cents per month. However, the delegates to the Appellant increased the dues by one dollar seventy-five cents per month per member in 1966 (R-34) out of which each local union was required to pay to the District Council the sum of ninety cents per month per member (R-34) thus increasing the per capita tax from three dollars twenty-five cents per month to four dollars fifteen cents per month per member.

SUMMARY OF ARGUMENT

29 USC 411(a) (3) provides as follows:

". . . (3) *Dues, initiation fees, and assessments.*— Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959, shall not be increased, and no general or special assessment shall be levied upon such members, except. . . .

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and by-laws of such labor organization: *Provided,* That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organizations."

The just referred to code section clearly contemplates that for any increase in the *rates* of dues, subsequent to its enactment in 1959, to be valid, certain procedural steps must be followed. The statute is equally clear that absent an increase in the *rates* of dues after 1959 the failure to follow certain procedural steps is of no moment.

The Appellant herein maintains that its rate of dues was established sometime prior to 1959, and for that reason, when the amount of dues was increased in 1966, it was not required to employ any of the methods set forth in Section 411 (a) (3).

ARGUMENT

I.

THE RATES OF DUES HAVE NOT BEEN INCREASED.

The record in this matter is clear that the formula which established the rate of dues for house painter local union members affiliated with the Appellant was established prior to 1959.

Dues were set at a base amount and the Appellant, through its delegates, was, and is, precluded from increasing the dues in excess of one hundred per cent of the total amount of any increase in wages for one working day per month, subject to the waiver provision which was added in 1962. The rate was set and has been maintained for approximately 10 years prior to the commencement of this action.

The Courts have recognized that rates of dues can be tied to wages and an increase in amount of dues is not necessarily proscribed by the act even though procedural steps are not taken.

See for example *Zentner* v. *Musicians* 237 Fed Supp. 457 (1965) affirmed 343 F.2d 758 (1965). In *Zentner*, supra, the Plaintiff sought to restrain locals from requiring non-local members to pay to them a percentage of their wages derived from performances within the locals jurisdiction. Both before and after September 14, 1959, the amounts collected by the locals were established pursuant to the Federations By-Laws at a rate not to exceed four (4) per cent.

The Court there stated:

> "Finally, there has been no showing by the plaintiff, much less any discussion of facts, that the 'work dues equivalents' in the Georgia and Florida locals are 'rates of increase beyond those as of September 14, 1959, the effective date of the Act. As plaintiff himself points out in his memorandum of law, Article 16, Section 26 of Federation's by-laws has for many years permitted locals to impose a levy not exceeding four per cent upon traveling members not subject to Federation's 'traveling surcharge of ten per cent. It has not been suggested that any levy imposed by the Florida and Georgia locals under Section 26 in effect on September 14, 1959, was less than the rate

> of the present 'work dues equivalents' which plaintiff now resists. In such circumstances there has been no increase in the 'rate' upon which a vote would have been required. Indeed, the papers are silent as to whether 'engagement dues' imposed by the Georgia local or the 'work dues equivalents' of the Florida local were enacted under the old Article 16, Section 26 provision or the more recent authority. It is of no consequence that the payments are styled 'work dues equivalents,' 'engagement dues,' 'monies equivalent to dues,' 'work permit fees' or 'tax'."

The Courts attention is directed to *Schwartz* vs. *Associated Musicians of Greater New York, Local 802*, 340 F.2d. 228 (1964) in which the Court by implication affirmed dues based on a percentage of earnings formula.

See also *Dejov* v. *Davis* (D.C. N. Ill) 61 LRRM 2203 (1966).

While exhaustive research into the legislative history of Section 411 of the Act has disclosed no reason for the use of the term rate as contrasted with amount, it is submitted that Congress must have been aware and recognized that not only do unions differ with regard to their due's formulas, but also within certain unions rates vary. For example, some unions' dues are at a flat rate, others are a percentage of earnings and others are related to wage increases. Further, it is well recognized that within

a given union there are certain classifications of members who pay a different amount of dues e.g. journeyman and apprentices.

II.

THE TRIAL COURT'S CRITERIA FOR DETERMINING WHETHER THE RATES OF DUES HAS BEEN INCREASED WAS IN ERROR.

The Trial Court, in arriving at its decision, placed a great deal of reliance upon a table prepared by it and its discussion based thereon (R-44-46).

While at first blush it may appear that there is some logic in the Trial Court's reasoning, it is submitted that if taken to its ultimate conclusion no organization could establish a dues structure that the Trial Court would not find fault.

For example, assuming a union with a flat dues structure amounting to $10.00 per month per member, or $120.00 per year. Obviously, the income of each member will vary in a given year as will the income of each individual member from year to year. Applying the court's reasoning to this hypothetical, although usual, situation, the percentage of dues as related to income will not only vary with regard to each member in a given year but also with regard to each individual member from year to year.

The Trial Court's reasoning, as it relates solely to the formula in the instant matter, not only dis-

regards the recession in the building industry before, during and after 1966, but would also require that before the Appellant imposes certain dues upon an individual for any given period it wait until the end of that period (a year if the Trial Court's formula is to be employed) so as to determine the number of hours worked.

Finally, it is submitted that the trial court, by implication, would find no fault with the formula used by the Appellant herein if it had, instead of waiving one dollar seventy-five cents, waived two dollars ninety cents, thus increased the amount of dues but by sixty cents.

CONCLUSION

For the reasons stated above, the judgment of the Court below should be reversed.

Dated, Oakland, California, July 1, 1968.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

We certify that in connection with the preparation of this brief we have examined rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.

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